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No. 80-489

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS A. DUZAC, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Clark v. *United States*, 289 U.S. 1 4

Mattox v. *United States*, 146 U.S. 140 2

McDonald v. *Pless*, 238 U.S. 264 3

Parker v. *Gladden*, 385 U.S. 363 2

Patterson v. *Colorado*, 205 U.S. 454 2

Turner v. *Louisiana*, 379 U.S. 466 2

United States v. *McKinney*, 429 F. 2d 1019, rev'd on other grounds, 434 F. 2d 831, cert. denied, 401 U.S. 922 5

United States ex rel. De Vita v. *McCorkle*, 248 F. 2d 1 4

United States ex rel. Owen v. *McMann*, 435 F. 2d 813, cert. denied, 402 U.S. 906 4

Constitution, statutes and rule:

United States Constitution:

Fifth Amendment 1

Sixth Amendment 1

18 U.S.C. 242 ..... 1, 2

18 U.S.C. 1623 1

Fed. R. Evid. 606(b) 3

Miscellaneous:

Advisory Committee's Note, Rule 606(b), Rules of Evidence, 56 F.R.D. 183 (1972) 4

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Petitioner contends that he was deprived of his Fifth and Sixth Amendment rights to a fair trial by an impartial jury and that the district should have conducted a post-trial hearing into the question of juror prejudice.

1. Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner, a New Orleans, Louisiana, police officer, was convicted of depriving Darrell Land of his civil rights under color of law, in violation of 18 U.S.C. 242, and of making a false statement to a grand jury, in violation of 18 U.S.C. 1623. His sentence on the Section 242 count was suspended in favor of three years' probation; he was sentenced to six months' imprisonment on the Section 1623 count. The court of appeals affirmed (Pet. App. 3a-10a; 622 F. 2d 911).

The evidence, which is not in dispute, showed that petitioner and several other New Orleans police officers wrongfully arrested Darrell Land, and, despite Land's protests that he was the wrong man, brutally beat and verbally abused him. Petitioner lied to a grand jury in his testimony about the incident.

During the second day of deliberations, the jury sent a note to the district court stating that "[t]here are certain prejudices among this jury due to prior personal experiences that prevent us from arriving at a unanimous decision on Count I [the Section 242 count]. * * * We are hung! " (Pet. App. 6a, 11a). After denying petitioner's motion for a mistrial the district court reminded the jury, in writing, of their obligation "to decide the case *solely* on the evidence * * * and *without prejudice or sympathy*" and "*carefully and impartially* to consider all of the evidence and follow the law given you in my charge in order to reach a *just verdict* * * * " (*ibid.*; emphasis in original). Shortly thereafter, the jury returned a guilty verdict on both counts (*id.* at 7a).

2. Petitioner contends (Pet. 4-9) that the district court should have declared a mistrial when it was notified that one or more of the jurors had certain prejudices based on prior personal experiences. He also contends (Pet. 9) that following the trial the court should have held an evidentiary hearing on the matter. These contentions were correctly rejected by the court of appeals.

a. There is no suggestion in the record that the jury's verdict was the result of improper outside pressures or of the jury's exposure to facts extraneous to the evidence in the case. See *Parker* v. *Gladden*, 385 U.S. 363, 364-365 (1966); *Turner* v. *Louisiana*, 379 U.S. 466, 472-473 (1965); *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907); *Mattox* v. *United States*, 146 U.S. 140 (1892). The exchange of notes between the jury and the trial judge suggests not

that the verdict was influenced by facts improperly brought to the jury's attention, but that the personal prejudice of one or more jurors was preventing the jury from reaching a unanimous verdict. If any inference of improper deliberations may be drawn from these notes and the subsequent guilty verdict, it is that one or more jurors was temporarily prejudiced in petitioner's favor, not against him, and that the district court's reminder that the jury was to decide the case "without prejudice or sympathy" (Pet. App. 6a, 11a) sufficed to produce a unanimous verdict. Petitioner's right to an impartially rendered jury verdict does not include a right to object to a verdict that has been delayed because of prejudice in his favor by one or more jurors.

b. The district court did not err in refusing to conduct a post-trial hearing into the question of juror prejudice. This is precisely the type of inquiry prohibited by Rule 606(b) of the Federal Rules of Evidence:

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict * * * or concerning his mental processes in connection therewith * * * .

This rule preserves the long established Anglo-American principle that a juror may not give testimony that would impeach his verdict. See *McDonald* v. *Pless*, 238 U.S. 264 (1915).[1] As the Advisory Committee stated

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[1]Rule 606(b) also codifies a previously recognized exception to that general principle, which permits jurors to testify "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Thus, for example, a juror could testify that statements about the defendant were made to

in its Note on Rule 606(b), "[t]he mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment." 56 F.R.D. 183, 265 (1972). Even though nothing in this case suggests that any of the jurors was prejudiced against him, petitioner would nonetheless require that the jurors be questioned in open court concerning their experiences, feelings and predispositions. There is no basis in law or policy for mandating such a procedure in the circumstances presented here.[2]

As Judge Friendly wrote for the court in *United States ex rel. Owen* v. *McMann*, 435 F. 2d 813, 818 (2d Cir. 1970), cert. denied, 402 U.S. 906 (1971), "[t]he touchstone of decision in a case [involving allegations of juror prejudice] * * * is thus not the mere fact of infiltration of some molecules of extra-record matter * * * but the nature of what has been infiltrated and the probability of prejudice." Any inquiry into the jury's deliberations must

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the jury by a bailiff. *E.g.*, *Parker* v. *Gladden*, *supra*; *Mattox* v. *United States*, *supra*.

Clark v. *United States*, 289 U.S. 1 (1933), cited by petitioner (Pet. 6), is inapposite. That case involved, not an attack on a verdict, but the contempt prosecution of a juror who was admittedly prejudiced in favor of a defendant and intentionally concealed that prejudice by false statements during voir dire. Moreover, petitioner's reliance (Pet. 7) on *United States ex rel. De Vita* v. *McCorkle*, 248 F. 2d 1 (3d Cir. 1957), is similarly misplaced. That case involved a juror who intentionally concealed on voir dire that he was the victim of a robbery by persons who were likely members of the defendant's gang. No concealment by any juror is claimed here.

[2] The court of appeals noted (Pet. App. 7a) that several weeks after the conclusion of the trial, the district court interviewed the jury foreman concerning the note; the transcript of that interview has remained under seal.

be limited to whether there has been an introduction into the jury room of extraneous facts; the inquiry should not delve into "subjective opinions of jurors, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system, and we cannot and should not excommunicate them from jury deliberations." 435 F. 2d at 818, quoting from *United States* v. *McKinney*, 429 F. 2d 1019, 1022-1023 (5th Cir.), rev'd on other grounds, 434 F. 2d 831 (5th Cir. 1970), cert. denied, 401 U.S. 922 (1971). In sum, the court below properly concluded (Pet. App. 8a-9a) that:

> Neither the note nor the post-trial interview with the foreman provided the judge with reason to hold an evidentiary hearing. The only questions that the trial judge might have asked at a hearing would have concerned the jurors' prejudices and, therefore, would have been impermissible. Under these circumstances, the judge did not abuse his discretion in failing to hold a hearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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